Supreme Court, U
FILED
SEP 25 198
MICHAEL RODAK, JR.,

No. 80-299

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN NUVEEN & CO., INC., a corporation, INVESTORS SYNDICATE OF AMERICA, INC., a corporation, and INVESTORS DIVERSIFIED SERVICES, INC., a corporation,

Petitioners,

vs.

HENRY T. SANDERS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

RICHARD ORLIKOFF,
208 South LaSalle Street,
Chicago, Illinois 60604,
Attorney for Respondents.

ROBERT J. PETERS,
FRANKEL, McKAY & ORLIKOFF
Of Counsel.

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

1. Whether an underwriter-seller of securities is liable to its purchasers under §12(2) of the Securities Act of 1933 for its negligence in failing to discover that the securities were issued fraudulently, and for material misrepresentations and omissions concerning those securities in prospectuses disseminated by it and in oral statements made by its salesmen.

2. Whether an underwriter who sells to the public fraudulently issued, unregistered securities which are not exempt from registration under the Securities Act of 1933 is liable under §12(1) of the Act to the purchasers of those securities.

PARTIES TO THE PROCEEDINGS

This class action was brought by Henry T. Sanders, on behalf of himself and all other purchasers from John Nuveen & Co., Inc. ("Nuveen") of notes issued and dishonored by Winter & Hirsch, Inc. ("WH"), a now defunct Illinois finance company. Defendants incorrectly state that subsequent to the entry of the initial judgment this action proceeded on a multiple plaintiff basis, with each plaintiff participating individually, through counsel. Petition ("Pet."), p. ii. This action always has proceeded as a class action. See Order Certifying Class, App. I, 42;[1]

---

[1] In the Seventh Circuit defendants filed a four-volume Appendix. References herein to portions of the record reproduced in that Appendix and not in the Appendix to the instant Petition shall be prefixed by the symbol "App.", followed by the Appendix volume number and page reference. References to exhibits admitted in evidence but not included in any appendix shall be made by reference to the exhibit numbers. References to the Appendix filed by defendants shall be designated "A", followed by the page reference.

Order Approving Class Claims, A. 18; Judgment Order, A. 20. Plaintiffs' attorneys have acted as class counsel since entry of the order designating the class.

Defendants correctly identify themselves in the Petition, but refer to Nuveen only as a "broker-dealer". Pet., p. 3. The record shows that Nuveen characterized itself as an underwriter of the sale of commercial paper in filings with state regulatory authorities. PX 6, App. II, 220, PX 7, Tr. 143.[2] The trial Court found, and the Court of Appeals has consistently affirmed, that Nuveen was the sole and exclusive underwriter of WH notes during the period involved. Judgment Order, A. 28; *Sanders II,* A. 63, 64, 69-70; *Sanders III,* A. 47; *Sanders IV,* A. 4.[3]

---

[2] "Tr." refers to the transcript of the trial preceding *Sanders II.*

[3] Plaintiffs adopt defendants' designations of the four opinions of the United States Court of Appeals for the Seventh Circuit in this action. See Pet., p. 1. When citing those opinions plaintiffs shall refer to the Appendix filed by defendants.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Parties to the Proceedings	i
Table of Contents	iii
Table of Authorities	v
Statutes Involved	viii
Statement of the Case	1
A. Nature Of The Case	1
B. Course Of The Proceedings	2
C. Operative Facts	4
1. The WH Fraud	4
2. Underwriting And Sale Of WH Notes By Nuveen	5
3. Investigation Of WH By Nuveen	6
4. Nuveen's Dissemination Of Commercial Paper Reports And Confirmation Statements	9
D. The Judgment Entered Below	10
Reasons For Denying The Petition	12
I. The Record Reveals That Nuveen Sold WH Notes In Violation Of Section 12(2) Of The Securities Act	12
A. The Court Below Correctly Measured Nuveen's Duties Against The Standard Of Reasonable Care Mandated By Section 12(2)	12

PAGE

B. The Investigation Of WH Made By Nuveen Was Negligent 16

C. Nuveen Misrepresented Material Facts In Selling WH Notes To Members Of The Plaintiff Class 20

II. The Judgment Under Section 12(2) May Be Sustained On Other Grounds 23

III. The Decisions Below Have Not Had And Will Not Have A Dampening Effect On The Commercial Paper Market 24

IV. Nuveen Sold Unregistered Securities To Members Of The Plaintiff Class In Violation Of Section 12(1) 26

Conclusion 26

Statutory Appendix ..... App. 1

§2(10) Of The Securities Act Of 1933 ..... App. 1

§2(11) Of The Securities Act Of 1933 ..... App. 1

§5 Of The Securities Act Of 1933 ..... App. 2

TABLE OF AUTHORITIES

Cases

PAGE

Alton Box Board Co. v. Goldman, Sachs & Co., 560 F.2d 916 (8th Cir. 1977) 13, 22, 24, 25

Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir.), *cert. denied,* 414 U.S. 910 (1973) 19

Croy v. Campbell, CCH Fed. Sec. L. Rep., Current Binder, ¶97,615 (5th Cir. 1980) 22

DeMarco v. Edens, 390 F.2d 836 (2d Cir. 1968) 20, 21

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 3, 13

Escott v. BarChris Construction Corp., 283 F.Supp. 643 (S.D.N.Y. 1968) 19

Feit v. Leasco Data Processing Equipment Corp., 332 F. Supp. 544 (E.D.N.Y. 1971) 19

Franklin Savings Bank v. Levy, 551 F.2d 521 (2d Cir. 1977) 13, 24, 25

Gilbert v. Nixon, 429 F.2d 348 (10th Cir. 1970) 21

Hill York Corp. v. American International Franchises, Inc., 448 F.2d 680 (5th Cir. 1971) 13

Jackson v. Oppenheim, 533 F.2d 829 (2d Cir. 1976) 23

Lorber v. Beebe, 407 F.Supp. 279 (S.D.N.Y. 1976) 23

Mason v. Marshall, 412 F. Supp. 294 (N.D. Tex. 1974) 23

Sanders v. John Nuveen & Co., Inc., 463 F.2d 1075 (7th Cir.), *cert. denied,* 409 U.S. 1009 (1972) .... *passim*

Sanders v. John Nuveen & Co., Inc., 524 F.2d 1064 (7th Cir. 1975), *vacated and remanded,* 425 U.S. 929 (1976) ..... *passim*

PAGE

Sanders v. John Nuveen & Co., Inc., 554 F.2d 790 (7th Cir. 1977) ..... *passim*

Sanders v. John Nuveen & Co., Inc., 619 F.2d 1222 (7th Cir. 1980) ..... *passim*

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 13

S.E.C. v. Goldman, Sachs & Co., CCH Fed. Sec. L. Rep., 1973-74 Transfer Binder, ¶94,556 (S.D.N.Y. 1974) 25

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 (1943) 13

TSC Industries v. Northway, Inc., 426 U.S. 438 (1976) 23

U. S. v. Folk, 199 F.2d 889 (4th Cir. 1952) 13

University Hill Foundation v. Goldman, Sachs & Co., 422 F. Supp. 879 (S.D.N.Y. 1976) 24, 25

Welch Foods, Inc. v. Goldman, Sachs & Co., 398 F. Supp. 1393 (S.D.N.Y. 1974) 2

Wigand v. Flo-Tek, Inc., 609 F.2d 1028 (2d Cir. 1979) 21

Wilko v. Swan, 346 U.S. 427 (1953) 13

Woodward v. Wright, 266 F.2d 108 (10th Cir. 1959) 21

Decisions Of The Securities and Exchange Commisison

Charles E. Bailey & Co., 35 S.E.C. 33 (1953) 13

Statutes and Rules

Securities Act of 1933, 15 U.S.C. §77a *et seq.*

§2(10), 15 U.S.C. §77b(10) 20, 24

§2(11), 15 U.S.C. §77b(11) 14

§5, 15 U.S.C. §77e 2

§11, 15 U.S.C. §77k 14, 15, 16, 18, 19

PAGE

§12(1), 15 U.S.C. §77l(1) 2, 3, 4, 26

§12(2), 15 U.S.C. §77l(2) ..... *passim*

§14(e), 15 U.S.C. §78n(e) 19

Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq.*
§10(b), 15 U.S.C. §78j(b) 2, 3, 23

Rules of the Securities and Exchange Commission
Rule 10b-5, 15 CFR §240.10b-5 2

Congressional Materials

H.R. Rep. No. 85, 73d Cong., 1st Sess. (1933) 18, 23

"The Financial Collapse of the Penn Central Company," Staff Report of the Securities and Exchange Commission to the Special Subcommittee on Investigations (1972) 25

Miscellaneous

Douglas and Bates, "The Federal Securities Act of 1933," 43 Yale L. J. 171 (1933) 21

Folk, "Civil Liabilities Under The Federal Securities Acts: The BarChris Case," 55 Va. L. Rev. 199 (1969) 18, 22

Landis, "The Legislative History of the Securities Act of 1933," 28 Geo. Wash. L. Rev. 29 (1959) 23

Note, "Escott v. BarChris: 'Reasonable Investigation' And Prospectus Liability Under Section 11 of the Securities Act of 1933," 82 Harv. L. Rev. 908, 909 (1961) 18, 19

Note, "The Commercial Paper Market and the Securities Act," 39 U. Chi. L. Rev. 362 (1972) 26

Prosser, Handbook of the Law of Torts (4th ed. 1971), §108 22

PAGE

Shulman, "Civil Liability and the Securities Act," 43 Yale L. J. 227 (1933) 22

Newspaper and Magazine Articles:

BNA Sec. Reg. & Law Report, No. 569 (Sept. 10, 1980), A-8-9 14

Forbes, 8/15/71, p. 22, "Heavy, Heavy . . ." 25

New York Times

"Bancorp on Coast Reveals Problems," 12/31/73, p. 27, col. 7 26

"Financial Collapse and Human Tragedy Stalk Mill Factors," 4/23/69, p. 71, col. 1 25

re Franklin N. Y. Corporation, 1/13/75, p. 44, col. 7 26

"Pioneer Finance; 'Tight Money' Claims a Casualty," 9/26/66, p. 63, col. 3 25

"Report on Atlantic Acceptance Urges Sweeping Rule Changes," 12/12/69, p. 89, col. 5 25

STATUTES INVOLVED

Section 2(10), 2(11), 5, and 12 of the Securities Act of 1933, 15 U.S.C. §§77b(10), 77b(11), 77e and 77l are the statutes involved in this case at this stage of the proceedings. Section 12 is set forth at pages A. 5-6 of the Statutory Appendix to the Petition for Certiorari. Sections 2(10), 2(11) and 5 are set forth in the Statutory Appendix annexed hereto.

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-299

JOHN NUVEEN & CO., INC., a corporation, INVESTORS SYNDICATE OF AMERICA, INC., a corporation, and INVESTORS DIVERSIFIED SERVICES, INC., a corporation,

Petitioners,

vs.

HENRY T. SANDERS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

A. NATURE OF THE CASE

The trial Court found and the Court of Appeals affirmed that Nuveen was negligent in investigating the financial condition of WH and the suitability of WH notes sold by Nuveen to the investing public, and that Nuveen misrepresented material facts and omitted to state material facts in the sale of WH notes to the class in violation of §12(2)

of the Securities Act of 1933 ("Securities Act"). Judgment Order, ¶¶C-7, C-16, C-18,[1] A. 41, 43; *Sanders IV*, A. 2 *et seq.*

The trial Court further found that defendants violated §12(1) of the Securities Act by selling unregistered WH notes to the class in violation of §5 of the Securities Act. Judgment Order, ¶C-19, A. 43. The Court of Appeals did not reach this issue. *Sanders IV*, A. 3, n. 1.

B. COURSE OF THE PROCEEDINGS

In *Sanders I* it was held on a certified question that the WH notes were securities not exempt from the anti-fraud provisions of the 1933 or 1934 Securities Acts. A. 85-92. *See* discussion of this ruling in *Sanders II*, A. 67; *Welch Foods, Inc.* v. *Goldman, Sachs & Co.*, 398 F. Supp. 1393, 1397 (S.D.N.Y. 1974). *Sanders I* also held that Nuveen sold WH notes to the public for investment. A. 89-91. *See Sanders II*, A. 75-77.

After remand and trial, judgment was entered on findings that defendants had violated §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) ("§10(b)"), and Rule 10b-5 thereunder. That judgment was affirmed in *Sanders II*.

In *Sanders II* the Court held that Nuveen did not make a reasonable investigation to determine whether WH was engaging in fraudulent practices, A. 69, 71-73, *see Sanders III*, A. 50, and that Nuveen made implied representations to the class that Nuveen had reasonable grounds to believe the WH notes would be paid at maturity. A. 76. The Court further held that defendants Investors Diversi-

---

[1] The term "C" refers to the Conclusions of Law contained in the Judgment Order.

fied Services, Inc. and Investors Syndicate of America, Inc. were controlling persons of Nuveen. A. 73-75. That holding is not now disputed.

Shortly following *Sanders II* this Court ruled that a finding of *scienter* was required to establish liability under §10(b). *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976). This Court then granted defendants' pending petition for *certiorari*, vacated *Sanders II*, and remanded the case to the Court of Appeals for further consideration in light of *Hochfelder*. 425 U.S. 929 (1976), A. 62.

In *Sanders III* the Court of Appeals held that the record did not show that Nuveen had knowledge that the WH notes were fraudulently issued, and reversed the judgment entered by the trial Court under §10(b). *Sanders III*, A. 50. The Court of Appeals disposed of two other grounds plaintiffs had advanced to support liability (involving §17(a) of the Securities Act and Rule 27 of the National Association of Securities Dealers), and then concluded that on the record it could not resolve the question whether defendants had violated §12(2) of the Securities Act. A. 51 *et seq.*

The case was remanded to the trial Court for ". . . further proceedings as may be necessary for the district court to make additional findings of fact and reach conclusions of law to support such judgment as the district court may reach on the possible liability of Nuveen under §12(2) of the 1933 Act." A. 59-60.

The Court of Appeals made it clear that it had not foreclosed plaintiffs from seeking a judgment on remand under §12(1) of the Securities Act. A. 60-61. (The Securities and Exchange Commission, as *amicus curiae* in *Sanders III*, took the position that a violation of §12(1) by Nuveen was shown in the record.)

In the trial Court plaintiffs, pursuant to leave of Court, amended their complaint only to list §12(1) as one of the sections of the Securities Act violated by defendants. The complaint previously contained an allegation that Nuveen had sold unregistered securities to the plaintiff class.

The trial Court permitted further discovery and conducted a supplementary evidentiary hearing. After briefing, the trial Court entered judgment for plaintiffs under §§12(1) and 12(2). A. 20 *et seq.* Further orders were entered in which each plaintiff's claim was allowed in a specific amount, A. 18, and in which attorneys' fees and expenses were awarded. A. 15-17. The Court of Appeals affirmed the judgment under §12(2), *Sanders IV*, A. 2, and rejected defendants' arguments that certain class members were not entitled to relief. *Sanders IV*, A. 13-14.[2]

C. OPERATIVE FACTS

1. The WH Fraud

The fraud perpetrated by WH and other basic facts are described in *Sanders II*. A. 63-67. Briefly, WH and its auditors overstated WH's accounts receivable and did not record all WH's indebtedness on the WH audit reports. This practice was followed for a period of ten years. By 1970 the accounts receivable were overstated by $14,000,000

---

[2] At the hearing after remand defendants additionally objected to four claims on the ground that privity between Nuveen and each of those claimants had not been shown. In *Sanders IV* the Court of Appeals noted the lack of argument before it on those objections. A. 14. Defendants petitioned for rehearing on their objections to the four claims. After response by plaintiffs in which record proof of privity between Nuveen and each claimant was identified, the Court of Appeals denied the Petition For Rehearing. A. 1.

on WH's financial statements, and those statements did not reflect $1,750,000 of debt. A. 25, FF 14(c), (d).[3] At the time Nuveen sold the WH notes here involved WH's liabilities exceeded its assets.

In the Fall of 1969 an anonymous telephone call to an officer of the First National Bank of Chicago, one of WH's lenders, triggered an investigation of WH. Agreed Statement of Uncontested Facts ("Stip."), ¶24, App. II, 108. An *ad hoc* committee of lenders caused WH to retain new auditors, Peat, Marwick, Mitchell & Co., who quickly uncovered the fraud. A. 23-25, FF 11, 13, 14. Finally, on February 10, 1970, an officer of the National Bank of Detroit telephoned Nuveen, advised it of the investigation, and suggested that Nuveen talk with a certain officer of the First National Bank of Chicago. The head of Nuveen's commercial paper department did so that day, and then suspended the sale of WH notes. A. 35-36, FF 60. Later in February 1970 the WH notes sold by Nuveen were dishonored. A. 25, FF 15.

2. Underwriting And Sale Of WH Notes By Nuveen

For nineteen months, including the period involved in this lawsuit, Nuveen was the exclusive underwriter and seller of WH notes. Nuveen purchased the notes at a discount and offered and sold them at a lower discounted rate, or higher price, in order to realize a profit. A. 28, FF 27.[4]

In September to December 1968, the first quarter Nuveen sold commercial paper, Nuveen sold or held in inventory

---

[3] The term "FF" refers to the Findings of Fact contained in the Judgment Order.

[4] It was stipulated that in selling and delivering the promissory notes of WH Nuveen made use of the U. S. mails and other instrumentalities of interstate commerce, A. 28, FF 27.

WH notes in amounts outstanding ranging from $2,618,000 to $2,890,000 at any given time. A. 28, FF 28. From January 1, 1969 to February 1970 (when it ceased selling WH notes) Nuveen purchased approximately 250 WH notes totalling $9,171,500 face value and sold approximately 275 WH notes with face value of $9,305,500. Nuveen's Answer to Interrogatory #3, App. I, 48. Over half of those sales were to individuals or for the accounts of individuals. Other purchases were by banks and insurance companies. A. 29, FF 30. Many of the purchases by banks were for customer accounts. The notes were sold in denominations as low as $1,000.00. Nuveen Trading Securities Ledger, PX 74, App. III, 419, Tr. 143, 160.

3. Investigation Of WH By Nuveen

In September 1968 Nuveen acquired the business and assets of Ashwell & Company ("Ashwell"). Nuveen never had sold commercial paper previously. A. 21-22, FF 4. Nuveen acquired some 40 commercial paper accounts, including WH, from Ashwell. A. 27, FF 25; A. 29, FF 31.

Ashwell had made no independent examination or investigation of WH's financial condition or corporate affairs since at least 1959. A. 27, FF 25; Tr. 230-1. Nuveen did not make any examination or investigation of any of Ashwell's accounts at the time of the acquisition of Ashwell, or prior to the time Nuveen commenced to handle commercial paper. A. 27, FF 25.

All commercial paper sold by Nuveen, including the notes issued by WH, was rated "Desirable" by the National Credit Office ("NCO"), a subsidiary of Dun and Bradstreet, in a rating system in which "Prime" was the highest rating and "Desirable" was the second rating. A. 30, FF 37.

After acquiring Ashwell, Nuveen hired a credit investigator to investigate the credit of all commercial paper issuers handled by Nuveen. A. 31, FF 40.

Credit was checked by examining financial statements received from the issuer, and reports on issuers received regularly from NCO. A. 31, FF 41. Nuveen had no requirement that the issuers have financial statements certified by a certified public accountant. A. 29-30, FF 34. Its credit investigator never checked any of the financial statements for accuracy, but compiled some 30 ratios from those statements, which were entered on sheets called "spread sheets". A. 31-32, FF 42.

Nuveen's credit investigator also addressed credit inquiries to banks which were lenders to the issuers. One credit investigator, David Vermeer, testified that the replies from banks did not tell anything about the financial strength of the issuer being checked; and Dale Daniels, head of Nuveen's Commercial Paper Department, confirmed that, "You don't get a credit evaluation out of banks." A. 31, FF 41.

In March 1969 Vermeer made a one-day visit to WH to determine whether WH's receivables were good, were aged properly, and how much delinquency in payments existed. A. 32, FF 46. Vermeer did not examine any internal control or accounting records, such as ledgers, nor any corporate records of WH. A. 33, FF 47. Vermeer testified he "most likely did" examine WH's federal tax returns because it was his practice to do so. A. 33, FF 47.

WH's 1968 tax return did not agree with WH's financial statement for that year. Stip. ¶47, App. II, 117. The tax return showed a loss of $995,000 in 1968, Stip. ¶47, App. II, 117; while the 1968 financial statement WH had sent to Nuveen showed a profit of $499,119.09 before provision of $244,000 for income taxes for the year. JX 3, App. II,

152, Tr. 166-167. WH paid no income tax in 1968. In addition, the beginning 1968 balance sheet on the tax return did not agree with the ending 1967 balance sheet on the 1967 return. Stip. ¶47, App. II, 117.

Vermeer was discharged in July 1969 and Donald Reid, then head of Nuveen's Commercial Paper Department, assumed responsibility for checking the credit of commercial paper issuers; but Reid testified he was overburdened and did not have time to do credit investigations. A. 33, FF 48, 50. Reid left Nuveen at the end of October 1969; he testified that one reason he left was that defendant Investors Syndicate of America would not honor his request for additional personnel. A. 34, FF 52. Daniels replaced Reid in November 1969. A. 34, FF 52.

Kenneth Wahlberg, Senior Vice President of Investors Diversified Services and a member of a three-man executive committee empowered to conduct and supervise Nuveen's operations, A. 22, FF 6, gave instructions in October 1969 to hire a credit investigator for the Commercial Paper Department. A. 34, FF 53. In December 1969 Nuveen hired Richard Ferreira as a credit investigator. A. 34, FF 54. From that time until Nuveen terminated its commercial paper operations in June 1970, the Commercial Paper Department consisted of Daniels, Ferreira, two salesladies and some clerical help. A. 34, FF 54.

Ferreira made no on-site inspections while he was with Nuveen, but otherwise used the same system for checking credit that Vermeer had followed. A. 34, FF 55.

In late December 1969, while on a whirlwind tour to familiarize himself with the commercial paper accounts handled by Nuveen's Chicago office, Daniels had lunch

with Milton Hirsch, the President of WH. A. 34-35, FF 56. Daniels noted that Hirsch looked ill and ordered Ferreira to do a credit report on WH. A. 35, FF. 56. In that report Ferreira rated WH notes "Desirable", the same rating given by NCO, and further reported that the audit report of WH which he examined was a "detailed audit". A. 35, FF 59.

On January 22, 1970, *after* he had written his report on WH, and at the urging of Daniels, Ferreira sent credit inquiries on WH to a dozen banks. Ultimately, on February 10, 1970, Nuveen was advised by a bank officer of WH's fraud. A. 35-36, FF 60.

On Daniel's recommendation Nuveen stopped selling all commercial paper in June 1970. Daniels testified that the reason for the discontinuance was that he felt he was a commercial paper operator in a bond house, and he felt uncomfortable; that he had neither the support nor the technical operation necessary to run a commercial paper operation; and that he ". . . never felt that John Nuveen & Company was a company to do a job in commercial paper . . . ." A. 36, FF 61.

4. Nuveen's Dissemination Of Commercial Paper Reports And Confirmation Statements

Nuveen customarily prepared "Commercial Paper Reports" on issuers; and these reports were distributed to buyers or potential buyers. A. 30, FF 35.

The Nuveen reports on WH summarized the false information contained in the WH financial statements. In addition, Nuveen represented that the figures on WH were from a detailed audit, when WH's auditors had stated in those financial statements that a detailed audit had

not been made. Compare JX 1, JX 2, JX 3, App. II, 131, 135-136, 142, Tr. 166-167, with PX 102, App. III, 567, Tr. 665; PX 103-PX 107, App. IV, 618-630, 696. The reports contained additional information as to the history, business and operations of WH, and a description of WH executive personnel.

Every member of the plaintiff class received from Nuveen a confirmation statement of his purchase of a WH note here at issue. PX 68, Tr. 143, 157-159. Each confirmation statement shows the face amount of the note sold, the price paid by the purchaser, the due date of the note, and states that Nuveen has sold the note as a principal.

Sanders' testimony at the trial in 1974, Tr. 112 *et seq.*, and the testimony of five additional witnesses on behalf of eight class members at the 1978 evidentiary hearing following remand, App. IV, 705 *et seq.*, establish that Nuveen's personnel recommended WH notes to purchasers. Nuveen's Trading Securities Ledger, the confirmation statements and the fact that Nuveen sold notes through 17 regional offices, Stip. ¶7, App. II, 104, by its entire sales staff, Tr. 208, show that Nuveen sold WH notes in the same manner that common stocks are sold.

Nuveen sold WH notes on the basis that there would be no question that the notes would be paid when due. A. 30, FF 35, Tr. 339.

D. THE JUDGMENT ENTERED BELOW

The total of the unpaid principal balances due members of the plaintiff class under the WH notes each of them had purchased from Nuveen, together with pre-judgment interest, equaled $914,313.53; and the trial Court

entered judgment in that amount. App. IV, 685. Following expiration of the stay of mandate granted by the Court of Appeals, defendants deposited with the Clerk of the District Court the sum of $1,035,309.65 in satisfaction of the judgment. That sum includes post-judgment interest. The Clerk has invested that deposit in interest-bearing securities pending disposition of the instant Petition and further order of Court.

The attorneys for the plaintiff class were awarded fees of $394,990.50 for their first nine years of service in this case. A. 15-17.

REASONS FOR DENYING THE PETITION

I. THE RECORD REVEALS THAT NUVEEN SOLD WH NOTES IN VIOLATION OF SECTION 12(2) OF THE SECURITIES ACT.

Section 12(2) fastens liability upon any person who sells a security by means of a prospectus or oral communication in which material facts concerning that security are misrepresented or omitted in a misleading fashion, and who does not establish that he did not know, and in the exercise of reasonable care could not have known, of the misrepresentation or omission. Defendants do not contest the falsity of the WH Commercial Paper Reports Nuveen prepared, or the misleading nature of the oral statements Nuveen's salesmen made to the class members who testified to their conversations with those salesmen.

Defendants seek to avoid the plain thrust of §12(2) in three ways. First, defendants argue that Nuveen had no responsibility to investigate or examine WH at all, and is absolved of all liability because it relied on audit reports which defendants claim were properly certified. Second, defendants say Nuveen was not negligent in its investigation of WH. Finally, defendants argue that Nuveen made no statement whatsoever to the majority of the plaintiffs which caused the purchase by any of them of a WH note from Nuveen. Defendants' arguments do violence to the record and to the law.

A. The Court Below Correctly Measured Nuveen's Duties Against The Standard Of Reasonable Care Mandated By Section 12(2).

If a party disseminates false information in a prospectus or oral communication concerning a security, that party is absolved of liability under §12(2) only if it is able to show that ". . . in the exercise of reasonable care

[it] could not have known [,] of such untruth or omission, . . ." By its terms §12(2) applies whether or not the securities are exempt from registration. *Hill York Corp.* v. *American International Franchises, Inc.*, 448 F.2d 680, 695 (5th Cir. 1971). Thus, §12(2) demands that all offerors or sellers of securities take reasonable care that statements made concerning securities offered or sold by them are true and are not misleading.[5]

"Reasonable care" is conduct free from negligence, and §12(2) has been uniformly interpreted as establishing a standard of negligence for all offerors or sellers of securities. *Alton Box Board Co.* v. *Goldman, Sachs & Co.*, 560 F.2d 916, 922-924 (8th Cir. 1977); *Franklin Savings Bank* v. *Levy*, 551 F.2d 521, 526-527 (2d Cir. 1977). *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 209-210 (1976).

The task in determining whether liability exists under §12(2), where *scienter* is not present, is to determine whether the offeror or seller was negligent in offering or selling a security in a misleading fashion. As in any negligence case, whether negligence exists must be determined from all the circumstances of the situation. *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943). The relationship between the injuring and injured party is a significant circumstance. *U. S.* v. *Folk*, 199 F.2d 889, 891 (4th Cir. 1952).[6] The Court below properly considered

---

[5] *See Wilko* v. *Swan*, 346 U.S. 427, 430-31 (1953) (". . . the Act requires issuers, underwriters and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale. To effectuate this policy, §12(2) creates a special right to recover for misrepresentation. . ."); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 512-514 (1974).

[6] The S.E.C. has recognized that the degree of care required of an underwriter under the Securities Act will vary with the circumstances of the offering. *See Charles E. Bailey & Co.*, 35 S.E.C. 33, 42-43 (1953).

the circumstances in which Nuveen sold WH notes to the class, giving due weight to Nuveen's status as an underwriter, A. 10-13, and concluded that ". . . the reasonable care standard required the reasonable investigation described in *Sanders II*." A. 13. Nuveen's role as exclusive underwriter of the sale of WH notes required that Nuveen make a reasonable investigation to determine that the notes were not fraudulently issued.[7]

Defendants point out that the term "reasonable investigation" appears in §11 of the Securities Act. Therefore, defendants argue, to find an underwriter negligent under §12(2) for failure to make a reasonable investigation distorts the pattern or scheme of the Securities Act.

Defendants' argument is simplistic. The reading consonant with Congressional intent is that a seller of securities must take reasonable care not to mislead those who invest in the securities whether or not they are registered. Whether the care actually taken is reasonable will depend upon the ability and position of the seller to learn the facts, among other considerations. As the Courts below pointed out, Nuveen had full access to WH's files, records, and offices. *Sanders IV*, A. 10-11; *Sanders II*, A. 69-70, 73. Nuveen was positioned to determine whether WH notes should be loosed upon the investing public and were suitable for sale under Nuveen's methods for selling commercial paper, i. e., that there would be no doubt that the paper would be paid when due. A. 30, FF 35. To sell in that manner

---

[7] In purchasing and distributing WH notes Nuveen falls squarely within the definition of an underwriter in §2(11) of the Securities Act. Defendants' argument that the term "underwriter" has meaning only under §11 has no basis. That sellers of unregistered securities may be underwriters is recognized by sellers of commercial paper and the securities industry generally. See, e.g., BNA Sec. Reg. & Law Report, No. 569 (Sept. 10, 1980), pp. A-8-9.

required that Nuveen make a reasonable investigation to determine that the notes, indeed, would be paid when due.

The careful analysis by the Court of Appeals of the differences in the language of §§11 and 12(2), and the duties imposed upon all sellers of securities under §12(2) as contrasted with the duties of sellers of registered securities in §11, A. 11-13, is contested by defendants. Defendants claim the relevant House Report refers only to securities sold pursuant to a registration statement. Such a reading is highly selective and obscures Congressional intent as well as specific references in that Report to §12(2). Defendants quarrel that the duty of an underwriter cannot be greater under §12(2) than under §11. The short answer is that the Court below has not imposed a more rigorous standard of conduct or duty upon Nuveen in this case than is imposed upon an underwriter of registered securities by §11. The Court below applied a standard of care applicable to the particular facts and circumstances of this case, and determined that to take reasonable care under those facts and circumstances Nuveen had "'. . . to make at least some investigation directed at the question whether the ever present possibility of fraud is in fact a reality.'" A. 11, quoting *Sanders II*, A. 73.

Nor did the Court below simply apply §11 standards of investigation in determining that Nuveen had been negligent, as defendants would have this Court believe.[8]

The distortion of the statutory pattern of the Securities Act found by defendants in the decision below is a manufactured one, and ignores Congress' stated purposes, both

---

[8] The Court below met defendants' contention directly. "Since what constitutes reasonable care under §12(2) depends upon the circumstances, we, of course, do not intimate that the duty of a seller under §12(2) is always the same as that of an underwriter in a registration offering under §11." A. 13.

in the legislative history and in the statute itself.[9] The Court below correctly applied §12(2) to the facts of this case in complete harmony with the legislative intent expressed in the statute.

B. The Investigation Of WH Made By Nuveen Was Negligent.

Nuveen did not investigate WH at all before it commenced to sell WH notes. Tr. 236-7, 415. When it did hire one credit investigator (and Nuveen never had more than one credit investigator for the 40-50 issuers of the short-term notes Nuveen sold), that investigator checked credit primarily by compiling ratios from WH's financial statements. A. 31, FF 42; Tr. 389-90; Tr. 579-80. The credit investigator for Nuveen who made a one-day visit to WH's office, Vermeer, testified that he was supposed to examine WH's federal tax returns, and he testified he "most likely did" examine them. Tr. 411. If Vermeer did look at WH's 1968 tax return his negligence is plain. The tax return showed a loss ($995,000), Stip. ¶47, App. II, 117; while the "audited" financial statement showed a gain ($499,119). PX 3, Tr. 143. A simpler indication of fraud, or irregularity requiring further investigation, is difficult to imagine. If Vermeer didn't look at WH's tax return his negligence is equally plain. As this Court concluded in *Sanders II*, "The indications of questionable practices by WH were easily accessible to a competent underwriter with a question of fraud in mind."

---

[9] Defendants torture the damage provisions of §11 and §12(2) to make it appear that the decision below raises the damage prospects under §12(2) higher than the potential damages under §11. The potential class of plaintiffs, of course, is much larger under §11. The relief decreed below, in effect, is rescission. Plaintiffs were required to assign their notes and to deposit them with the Court, to be delivered to defendants upon the return of the consideration paid, less amounts received in partial payments of the notes. App. I, 94-95.

A. 73. Clearly, Nuveen made an investigation of WH which was negligent.

Defendants imply that their investigation of WH satisfied statutory requirements because Nuveen made inquiries of bank lenders, and the bank lenders did not tell Nuveen that anything was wrong with WH. Whatever the lending banks did, their legal obligations did not arise under the Securities Act. *See Sanders II,* A. 72. Nuveen cannot avoid its statutory responsibilities with the claim that it made inquiry of others who had no obligation under the Securities Act to investigate at all.

Defendants further argue that their actions in selling WH notes were reasonable because they relied upon certified financial statements of WH which WH submitted to them.[10]

---

[10] While the S.E.C., in an *amicus* brief previously filed in this case, took the position that ". . . the long-form Lieber audit report itself raised no necessity for further inquiry" (a position with which plaintiffs do not agree), the S.E.C. also stated that: "Notwithstanding that there are no 'red flags' here, we agree with this Court that: "The underwriter is under a duty to make at least some investigation directed at the question whether the ever present possibility of fraud is in fact a reality' ". S.E.C. Brief, 74-2407 and 75-1260 ("S.E.C. Brief"), p. 68, quoting *Sanders II.*

The S.E.C. then went on to express concern over the statement of then Judge Stevens that ". . . a request to examine federal income tax returns, corporate minute books and accountants [sic] work papers . . . would have revealed the fraud. . . ." S.E.C. Brief, p. 68. This statement was misinterpreted by the S.E.C. (and by defendants) as requiring an underwriter to analyze the work product of the auditors. But, the Court in *Sanders II* pointed out that auditor's work papers did not exist or were not available, A. 66, and in the statement quoted obviously meant that Nuveen should have taken some steps to determine whether an audit actually had been performed.

The position of the S.E.C. before the Court of Appeals in

(footnote continued)

Again, defendants look to §11 and argue that under that section the underwriter of a fraudulent, registered securities issue is exonerated if the issuers' financial statement has been audited. Nothing in §11 states that once a certified audit is rendered an underwriter has no further duty of investigation, but may rely solely upon the audit as presented to it.[11]

"With regard to parts attributed to an expert other than himself, a defendant has the lesser burden of proving that 'he had no reasonable ground to believe and did not believe . . . that the statements therein were untrue or [contained a misleading or unlawful omission of a material fact] . . . .' " Note, "Escott v. BarChris: 'Reasonable Investigation' And Prospectus Liability Under Section 11 of the Securities Act of 1933," 82 Harv. L. Rev. 908, 909 (1961) ("Note"). While the duty to investigate expertised portions of a registration statement may be less

---

(footnote continued)

Sanders III was that, "Under the Special Circumstances of this Case, the Imposition of Liability against Nuveen under Section 12(2) Would Not Be Inappropriate." S.E.C. Brief, heading, p. 60. In the section following that heading, the S.E.C. pointed out that this case involved commercial paper sold to ". . . unsophisticated individual investors purchasing non-prime quality, non-discountable commercial paper." S.E.C. Brief, pp. 69-70.

The S.E.C. then stated that it was the Congressional mandate that the duty of care vary, *inter alia*, ". . . with the degree of protection that the public has a right to expect, . . ." S.E.C. Brief, p. 72, citing H. R. Rep. No. 85, 73d Cong., 1st Sess. 9 (1933). The S.E.C. then terminated that section with the comment, "If, however, . . . [Nuveen's] duty were measured against an assumption that sophisticated, institutional, purchasers did not need the benefits of registration, we conclude that Nuveen would have 'just barely established that [it] reasonably investigated * * *.' " (Citation omitted.) S.E.C. Brief, p. 76.

[11] See Folk, "Civil Liabilities Under The Federal Securities Acts: The BarChris Case," 55 Va. L. Rev. 199, 211-215 (1969). (Hereinafter "Folk, p. ----".)

rigorous than the duty to investigate the non-expertised portions, the underwriter may not ignore discrepancies which he knows, or should know, exist (e.g., in this case, that the tax return and the financial statement could not be reconciled). Thus, in *Chris-Craft Industries, Inc.* v. *Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973), an underwriter was held liable under §14(e), 15 U.S.C. §78n(e), for misstatement in a registration statement of the book value of an asset when the corporate minutes showed discussions of the possible sale of the asset at a substantially lower figure. 480 F.2d at 367, 371-373.

Certainly it is incumbent upon the careful underwriter to determine whether in fact an audit had been made, whether selling registered or unregistered securities. (For discussions of §11 duties *see, Feit* v. *Leasco Data Processing Equipment Corp.*, 332 F. Supp. 544, 576-579, 581-583 (E.D.N.Y. 1971); *Escott* v. *BarChris Construction Corp.*, 283 F. Supp. 643, 692-697 (S.D.N.Y. 1968); Note, *supra*, 82 Harv. L. Rev. at 911-916.)

In this case Nuveen did not know and had never met anyone at Lieber, Bleiweis & Co., the auditing firm. Nuveen made no effort to find out whether an audit in fact had been made.

Refutation of defendants' argument is that the Congressional plan in the Securities Act was not to insulate underwriters, sellers, and offerors from liability whenever an issuer presents a certified audit of its affairs, but to require that underwriters and sellers of securities act prudently and carefully to avoid misleading the investing public when selling securities in interstate commerce.

C. Nuveen Misrepresented Material Facts In Selling WH Notes To Members Of The Plaintiff Class.

Defendants acknowledged below that Nuveen's commercial paper reports were used in the sale of WH notes.[12]

Nuveen's commercial paper reports on WH are prospectuses, since they admittedly were prepared for the purpose of selling WH notes.[13] Sales brochures are "prospectuses" under §12(2). *DeMarco* v. *Edens,* 390 F.2d 836, 840 (2d Cir. 1968).

Nuveen disseminated its commercial paper reports widely to prospective purchasers of commercial paper.[14] That those reports were false and misleading is not contested. While plaintiffs introduced evidence of receipt of a Nuveen report on WH by only nine plaintiffs, the admitted use of those reports in connection with the sale of WH notes taints the entire issue. The commercial paper reports were principal instruments utilized by Nuveen to market notes.

---

[12] A. 30, FF 35. The interrogatory answer referred to in FF 35 reads:

> "7. Please list any and all written or printed material which was used by any of the Defendants in making or effectuating purchases or sales of any securities of Winter & Hirsch.
>
> "7. Purchase confirmations; sale confirmations; and John Nuveen & Co. Incorporated 'Commercial Paper Report' on Winter & Hirsch Inc., as revised from time to time. Said documents have heretofore been produced to counsel for the plaintiff pursuant to Rule 34." App. I, 50.

[13] The term "prospectus" is defined in §2(10).

[14] The WH Commercial Paper Reports were issued during the entire period Nuveen sold WH notes. Nuveen even issued a report on WH which was dated April 23, 1968, which is prior to the date it acquired Ashwell. PX 103, App. IV, 618-620, 696. No sale to a class member preceded distribution of a WH commercial paper report by Nuveen.

Again, defendants attempt to base their argument upon the statute. The searching analysis by the Court below of the legislative history of the Securities Act on this point, A. 8-10, withstands defendants' attack. Defendants, in effect, ask this Court to place a judicial gloss on the statute that would nullify Congressional intent.

Defendants argue that each member of the plaintiff class must prove that it received Nuveen's Commercial Paper Report on WH and that the class member bought his WH note because of the statements made in the report. As the Court below pointed out, "It is well settled that §12(2) imposes liability without regard to whether the buyer relied on the misrepresentation or omission." (Citations omitted.) A. 7. Congress, in §12(2), ". . . did not impose the burden of proving reliance on the false statement as a condition of recovery." *Gilbert* v. *Nixon,* 429 F.2d 348, 357 (10th Cir. 1970); *Woodward* v. *Wright,* 266 F.2d 108, 116 (10th Cir. 1959). To the same effect, *see Wigand* v. *Flo-Tek, Inc.,* 609 F.2d 1028, 1034 (2d Cir. 1979), citing *DeMarco* v. *Edens,* 390 F.2d 836 (2d Cir. 1968); Douglas and Bates, "The Federal Securities Act of 1933," 43 Yale L. J. 171, 174 (1933).

Defendants nevertheless argue that proof of causation is necessary under §12(2), and the fact that not every plaintiff proved he received Nuveen's Commercial Paper Report shows that causation is not present. In so arguing defendants seek to inject into §12(2) the reliance requirement of the common law action of deceit. "The deceit action is maintainable . . . only by one to whom, or to influence whom, the representation is made." Shulman, "Civil Liability and the Securities Act," 43 Yale L. J. 227, 239 (1933). The 'special right' to recover provided under §12(2) ". . . was intended to substantially change the common law concept of liability for fraud and deceit . . ." *Woodward* v. *Wright,* 266 F.2d 108, 116 (10th Cir. 1959).

At common law it is necessary to show that the buyer or seller relied on the misrepresentation, and that without the misrepresentation the transaction would not have occurred.[15]

Reliance need not be proved to establish liability under §12(2). "Causation" under §12(2) is thus not a common law concept. That requirement is satisfied by proof that the defendant was the instrumental factor in effecting the transaction. *Croy* v. *Campbell,* CCH Fed. Sec. L. Rep., Current Binder, ¶97,615 (5th Cir. 1980).

The necessary causal nexus may be found in the sale of the notes by Nuveen and Nuveen's negligent failure to investigate to determine that the prospectus issued by Nuveen was not misleading. *See Alton Box Board Co.* v. *Goldman, Sachs & Co.,* 560 F.2d 916, 924 (8th Cir. 1977).

It is a tenable view that the showing of causation under §12(2) limits recovery by the purchaser to his immediate seller.[16] In this case, where Nuveen sold each WH note to

---

[15] "The causal connection between the wrongful conduct and the resulting damage, essential throughout the law of torts, takes in cases of misrepresentation the form of inducement of the plaintiff to act, or to refrain from acting, to his detriment. . .

"In order to be influenced by the representation, the plaintiff must of course have relied upon it, and believed it to be true." Prosser, *Handbook of the Law of Torts* (4th ed. 1971), §108, at p. 714.

[16] Professor Folk contends that the concept of causation has no utility in determining liability under §12(2) where privity is required. "Privity is strict and causation is irrelevant. . ." Folk, p. 203.

each member of the plaintiff class, that view of §12(2) presents no obstacle to recovery for the class.[17]

Jackson v. *Oppenheim*, 533 F.2d 829 (2d Cir. 1976) is distinguishable, as the Court below distinguished it, since a conversation upon which plaintiff there sought to base liability was unrelated to the sale of the security. A. 9, note 7.[18]

The WH notes were not and could not be sold in a transactional vacuum. They were sold in a market created by Nuveen, by means of Nuveen's commercial paper reports, and other sales efforts. Nuveen alone offered and sold those notes to the public, including every member of the plaintiff class. In that situation the causation requirement for liability under §12(2) is satisfied as to each member of the plaintiff class. See H. R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933).[19] The reading of the statute by the Court below is correct. A. 8-10.

---

[17] Even under the more onerous burden of proof prescribed under §10(b) of the Securities Exchange Act of 1934 proof of causation is supplied by proof that the misstatements are material. *TSC Industries* v. *Northway, Inc.*, 426 U.S. 438 (1976). It is not controverted that Nuveen's reports on WH were materially misleading.

[18] Neither *Mason* v. *Marshall*, 412 F. Supp. 294 (N.D. Tex. 1974), nor *Lorber* v. *Beebe*, 407 F. Supp. 279 (S.D.N.Y. 1976), supports defendants' causation argument. Pet., p. 24. In *Mason* the Court found no §12(2) liability because the allegedly misleading statement was not material, 412 F. Supp., at p. 301; while in *Lorber* the stock plaintiff purchased was not part of the stock issue with which the allegedly misleading prospectus was concerned. 407 F. Supp, at p. 286.

[19] For a first-hand account of the evolution of the Securities Act in the House and Senate Committees, see Landis, "The Legislative History of The Securities Act of 1933," 28 Geo. Wash. L. Rev. 29 (1959).

II. THE JUDGMENT UNDER SECTION 12(2) MAY BE SUSTAINED ON OTHER GROUNDS.

The decision below may be upheld on the ground that a confirmation statement is a "prospectus" as defined by the Securities Act, §2(10). The record shows that each member of the class received a confirmation statement, PX 68, and that the confirmations contained misleading statements, and omitted material facts.[20]

The decision below also may be upheld on the ground that Nuveen represented to each member of the plaintiff class, by implication, that Nuveen had taken reasonable care to determine that the WH notes it sold were suitable for investment, and that these notes would be paid when due. There is ample authority for this view. *Alton Box Board Co.* v. *Goldman, Sachs & Co.*, 560 F.2d 916, 922-3 (8th Cir. 1977); *Franklin Savings Bank* v. *Levy*, 551 F.2d 521, 526-7 (2d Cir. 1977); *University Hill Foundation* v. *Goldman, Sachs & Co.*, 422 F. Supp. 879, 893 (S.D.N.Y. 1976).

Plaintiffs will not present either argument at this juncture.

III. THE DECISIONS BELOW HAVE NOT HAD AND WILL NOT HAVE A DAMPENING EFFECT ON THE COMMERCIAL PAPER MARKET.

Defendants point out the enormous size of the market for commercial paper that exists today, Pet., p. 16, n. 19, and argue, *in terrorem*, that the decision below will impair that vital market.

We agree that the market for commercial paper has burgeoned and now is enormous. That growth has taken

---

[20] It was the view of the S.E.C. before the *Sanders III* Court that since each member of the plaintiff class received a confirmation statement of his purchase from Nuveen, ". . . these sales were made by means of a written prospectus which contained a material omission." S.E.C. Brief, p. 59, continued footnote 117.

place since the Securities Act was enacted, and, in part, since the decisions in *Alton Box Board Co.* v. *Goldman, Sachs & Co.*, 560 F.2d 916 (8th Cir. 1977); *Franklin Savings Bank* v. *Levy*, 551 F.2d 521 (2d Cir. 1977); and *University Hill Foundation* v. *Goldman, Sachs & Co.*, 422 F. Supp. 879 (S.D.N.Y. 1976), all of which found sellers of dishonored notes liable for breaches of implied representations.

Nor did the consent decree entered following the Penn Central financial fiasco and subsequent dishonor of Penn Central's notes in *S.E.C.* v. *Goldman, Sachs & Co.*, CCH Fed. Sec. L. Rep., 1973-74 Transfer Binder, ¶94,556 (S.D.N.Y. 1974) (wherein Goldman, Sachs agreed to conduct a more rigorous investigation of issuers of notes than that found necessary by the Court below) stunt the growth of the commercial paper market.

The principal purpose of the Securities Act is to provide protection to the investing public. The gigantic size of the commercial paper market does not lessen the need for or desirability of affording that protection in accordance with Congressional intent.[21]

---

[21] Among the companies that have dishonored their commercial paper are the following. Atlantic Acceptance Corporation, Ltd., see "Report of Atlantic Acceptance Urges Sweeping Rule Changes," N. Y. Times, 12/12/69, p. 89, col. 5; Pioneer Finance Co. ($3 million of commercial paper), see "Pioneer Finance: 'Tight Money' Claims A Casualty," N. Y. Times 9/26/66, p. 63, col. 3; Mill Factors Corporation ($6.7 million of commercial paper) see "Heavy, Heavy . . .", Forbes, 8/15/71, p. 21, "Financial Collapse and Human Tragedy Stalk Mill Factors," N. Y. Times, 4/23/69, p. 71, col. 1; Penn Central Transportation Company ($85 million of commercial paper), see "The Financial Collapse of the Penn Central Company," Staff Report of the SEC to the Special Subcommittee on In-

(footnote continued)

IV. NUVEEN SOLD UNREGISTERED SECURITIES TO THE PLAINTIFF CLASS IN VIOLATION OF SECTION 12(1).

It is plaintiffs' position that the record below shows a violation of §12(1) of the Securities Act. In *Sanders III* the S.E.C., as *amicus curiae*, urged the Court of Appeals to affirm on that ground. The trial Court found §12(1) had been violated; but the Court of Appeals did not reach the question. Even in the absence of any §12(2) violation the trial Court's judgment should be affirmed under §12(1).

CONCLUSION

For the foregoing reasons plaintiffs pray that the Petition for Certiorari be denied.

Respectfully submitted,

RICHARD ORLIKOFF
208 South LaSalle Street
Chicago, Illinois 60604

Attorneys for Plaintiffs-Respondents

ROBERT J. PETERS,
FRANKEL, MCKAY & ORLIKOFF,
Of Counsel

(footnote continued)

vestigations (August, 1972); Beverly Hills Bancorporation ($13 million of commercial paper), see "Bancorp on Coast Reveals Problems," N. Y. Times, 12/31/73, p. 27, col. 7; Franklin N. Y. Corporation, see N. Y. Times, 1/13/75, p. 44, col. 7. Many of these defalcations are discussed in Note, The Commercial Paper Market and the Securities Act, 39 U. Chi. L. Rev. 362, 378 (1972).

APPENDIX

STATUTORY APPENDIX

Sections 2(10) and 2(11) of the Securities Act of 1933, 15 U.S.C. §77b(10), (11):

When used in this title [15 USCS §§77a et seq.] unless the context otherwise requires—

(10) The term "prospectus" means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security; except that (a) a communication sent or given after the effective date of the registration statement (other than a prospectus permitted under subsection (b) of section 10 [15 USCS §77j(b)]) shall not be deemed a prospectus if it is proved that prior to or at the same time with such communication a written prospectus meeting the requirements of subsection (a) of section 10 [15 USCS §77j(a)] at the time of such communication was sent or given to the person to whom the communication was made, and (b) a notice, circular, advertisement, letter, or communication in respect of a security shall not be deemed to be a prospectus if it states from whom a written prospectus meeting the requirements of section 10 [15 USCS §77j] may be obtained and, in addition, does no more than identify the security, state the price thereof, state by whom orders will be executed, and contain such other information as the Commission, by rules or regulations deem necessary or appropriate in the public interest and for the protection of investors, and subject to such terms and conditions as may be prescribed therein, may permit.

(11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or par-

ticipates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Section 5 of the Securities Act of 1933, 15 U.S.C. §77e:

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security with respect to which a registration statement has been filed under this title [15 USCS §§77a et seq.], unless such prospectus meets the requirements of section 10 [15 USCS §77j]; or

(2) to carry or cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of subsection (a) of section 10 [15 USCS §77j(a)].

(c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use or medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8 [15 USCS §77h].